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Supreme Court of the United States

OCTOBER TERM, 1948

CARL ALDO MARZANI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

No. 59

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONER

In its Brief, the Government has raised the new issue of the review by this Court of the holding of the court below, claimed to be error, that the first nine counts of the indictment herein are barred by the statute of limitations (Gov't. Brief pp. 24-43). This issue was not raised by the petition nor by the Government through cross petition for writ of certiorari. On the contrary, the Government strongly opposed the granting of the petition as to other issues in this case which are dependent on the holding of the court below with respect to the first nine counts. It urged that the decision in *United States* v. *Gottfried*, 165 F. 2d 360, 367-368 (C. C. A. 2, 1948) cert. denied 333 U. S. 860 was correct and that no conflict existed between the decision of the Second Circuit in that case and the con-

trary holding of the court below in this case, because the holding here with respect to the statute of limitations was a mere dictum. (Brief in Opposition to Petition, pp. 17-19). Without waiving objection to the failure of the Government to show good cause or exceptional circumstances to invoke the power of this Court to review this issue (See *Federal Trade Commission*, 273 U. S. 66; *Langnes* v. *Green*, 282 U. S. 531, 535-538; *Kessler* v. *Strecker*, 307 U. S. 22, 33), we submit that the holding of the court below on this issue is amply warranted by pertinent statutes and applicable decisions of this Court.

Summary of Argument

POINT IV. THE COURT BELOW CORRECTLY HELD THAT THE FIRST NINE COUNTS OF THE INDICTMENT WERE BARRED BY THE STATUTE OF LIMITATIONS.

Since the first nine counts of the indictment charge crimes under the False Claims Act (18 U. S. C. Section 80 clause 2, now 18 U. S. C. Section 1001) committed more than three years before the indictment was returned, prosecution, trial and punishment of petitioner on these counts is barred by the statute of limitations (18 U. S. C. Section 582, now 18 U. S. C. Section 3282). The Suspension Act (18 U. S. C. Section 590(a) clause 1, now 18 U. S. C. Section 3287) is not applicable to these offenses under the False Claims Act. The Suspension Act suspends the running of the statute of limitations "applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner . . ." It is not applicable in any case

unless two requirements are present in the statute defining the offense: first, the purpose or intent to defraud the United States; and second, pecuniary or property loss to the United States.

In *United States* v. *Noveck*, 271 U. S. 201, *United States* v. *McElwain*, 272 U. S. 633 and *United States* v. *Scharton*, 285 U. S. 518, this Court construed the 1921 proviso to the general statute of limitations and the 1926 proviso to the Revenue Act of 1926, which are in pertinent part identical predecessors of the Suspension Act, as applicable only to offenses in which intent to defraud is an element in the statute defining the offense. Numerous lower court cases without exception are to the same effect. When Congress enacted the Suspension Act, employing the essential language of the 1921 and 1926 provisos, it adopted the construction given by this Court to such language and made it part of the enactment.

"Defrauding" as used in the Suspension Act means the causing of pecuniary or property loss to the Government. This is the primary and ordinary meaning of the word "defrauding" and there are no apt words in the Suspension Act extending its meaning to a broader scope, such as the words "for any purpose" which accompany "defrauding" in the general conspiracy statute. *United States* v. *Cohn*, 270 U. S. 339; *United States* v. *Keitel*, 211 U. S. 370, 373. Other provisions of the Contract Settlement and Surplus Property Acts, of which the Suspension Act is a part, emphasize that "defrauding" is limited to its primary meaning. The House and Senate Committee Reports accompanying the bill also demonstrate the legislative intent to limit suspension to offenses involving pecuniary or property loss to the Government. The court below so construed the statute.

The False Claims Act, defining the offense on which the first nine counts of the indictment are based, punishes "whoever shall knowingly and wilfully . . . make . . . any false or fraudulent statements. . . . in any matter within the jurisdiction of . . . the United States." Neither the intent to defraud nor pecuniary or property loss to the Government is an element of the offenses here charged. The legislative history of the 1934 amendment to the False Claims Act, which eliminated the words with "intent to defraud" and "defrauding" from the prior statute, demonstrates that the intent to defraud is not an element of the offense: this Court has construed the statute as not requiring pecuniary or property loss to the Government. *United States* v. *Gilliland,* 312 U. S. 86. The trial court instructed the jury that pecuniary loss is not an element of the offense. The court below agreed.

Since the Suspension Act is applicable to offenses in which intent to defraud and pecuniary or property loss to the United States are elements under the statute defining the offense, and the False Claims Act is a statute in which neither element is essential, the court below correctly refused to apply the Suspension Act to the offenses under the first nine counts of the indictment.

Argument

POINT IV. THE COURT BELOW CORRECTLY HELD THAT THE FIRST NINE COUNTS OF THE INDICTMENT WERE BARRED BY THE STATUTE OF LIMITATIONS.

Of the eleven counts of the indictment (R. 2-19), the first nine charge that petitioner in violation of the 18 U. S. C. Section 80 clause 2 (now 18 U. S. C. Section 1001, herein-

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after referred to as the False Claims Act)[1] made certain false and fraudulent statements in matters within the jurisdiction of agencies of the United States on or before April 20, 1943 (Count I-IV, July 1942; Counts V-VII, November 1942; Counts VIII-IX, April 1943). The indictment was returned on January 17, 1947 (R. 273). If the general statute of limitations applies (18 U. S. C. Section 582, now 18 U. S. C. Section 3282)[2] these counts are barred.

Prior to, during, and after trial, petitioner moved for this reason to dismiss these counts of the indictment (R. 20, 31, 46). The trial court denied these motions, holding that 18 U. S. C. Section 590(a) clause 1 (now 18 U. S. C. Section 3287, hereinafter referred to as the Suspension Act)[3] applied to these offenses (R. 26-30, 31, 33) and suspended the running of the statute of limitations. The court below held—correctly, we submit—that the trial court's refusal to dismiss these counts was error. The opinion of the court below is discussed in subsection C. below.

The precise issue as to whether or not the statute of limitations is suspended as to these counts turns on whether the Suspension Act, which applies to offenses involving "defrauding or attempts to defraud the United States . . . whether by conspiracy or not and in any manner," applies to the offenses in the first nine counts of the indictment under the False Claims Act, which charged petitioner with having "knowingly and wilfully made false and fraudulent statements in a manner within the jurisdiction of an agency of the United States".

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[1]See Appendix A. p. 1.
[2]See Appendix A. p. 3.
[3]See Appendix A. pp. 2-3.

To determine this issue, it is necessary to consider the legislative history and applicable decisions of this Court relating to the Suspension Act and the False Claims Act.[4]

The essential wording of the Suspension Act, "defrauding or attempting to defraud the United States . . . whether by conspiracy or not and in any manner" derives originally from a proviso to U. S. C. Title 18, §582, enacted on November17, 1921, in connection with war frauds arising out of the first World War.[5] The 1921 proviso read:

> "*Provided, however,* that in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. . . ."

This proviso was construed by the Supreme Court in *U. S.* v. *Noveck,* 271 U. S. 201 (1926) and *U. S.* v. *McElwain,* 272 U. S. 633 (1926). A proviso enacted in 1926 in identical language, to U. S. C. Sup. V. Title 18 §585,[6] Appendix A, p. 4, was further construed by the Supreme Court in *U. S.* v. *Scharton,* 285 U. S. 518 (1932). To overcome the effect of these decisions, all holding the language of the proviso inapplicable to the offenses charged, the Revenue Act of 1926 was amended (See *Braverman* v. *U. S.,* 317 U. S. 49, 54-5).

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[4]The legislative history of the False Claims Act is discussed in Subsection B, *infra.*

[5]Appendix A. pp. 3-4.

[6]Appendix A. p. 4.

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Shortly after the United States became involved in the second World War, the Act of August 24, 1942 was enacted. This act provided, in pertinent language identical with that of the 1921 and 1926 provisos:

> "The running of any existing statute of limitations applicable to any offense against the laws of the United States, involving defrauding or attempts to defraud the United States whether by conspiracy or not, and in any manner and now indictable under any existing statutes shall be suspended until June 30, 1945 or such earlier time as the Congress by concurrent resolution or the President may designate." [7]

In July 1944, the Act of August 24, 1942 was amended by the Contract Settlement Act of 1944,[8] and, in October 1944, by the Surplus Property Act of 1944,[9] which eliminated the phrase "now indictable under any existing statutes", added the clauses now numbered (2) and (3) and changed the suspension date from June 30, 1945 to three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress (See Appendix A).

In all essential respects, however, clause 1 of Sec. 590 (a) is identical with the 1921 proviso to U. S. C. Title 18, §582, the 1926 proviso to U. S. C. Sup. V, Title 18, §585 and the Act of August 24, 1942.

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[7] Appendix A. p. 5.
[8] Appendix A. pp. 5-10.
[9] Appendix A. pp. 10-13.

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A. The Suspension Act is Applicable Only to Offenses in which Intent to Defraud and Pecuniary or Property Loss to the United States are Elements under the Statute Defining the Offenses.

(1) INTENT TO DEFRAUD THE UNITED STATES.

Since Congress, in enacting the Suspension Act, employed the essential language of the 1921 and 1926 provisos, it is clear, under well settled rules of statutory construction, that it adopted also the construction given by this Court to such language and made it a part of the enactment (*Shapiro* v. *United States,* decided June 21, 1948, 92 L. Ed. 1426, 1433; *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 488, 489; *United States* v. *Ryan,* 284 U. S. 167, 175. This view is confirmed by the legislative history of the Act of August 24, 1942. Both the House and Senate Reports [H. Rpt. 2051 and S. Rpt. 1544 to accompany H. R. 6484, 77th Cong. 2nd Ses.] refer specifically to the 1921 proviso, the circumstances surrounding its enactment and the necessity for a similar suspension of the normal statute of limitations during the second World War.[10]

The construction given by this Court to the 1921 and 1926 provisos and therefore properly to be given to the Suspension Act, is that suspension of the statute of limitations is applicable only where the defrauding or attempting to defraud the United States is an essential ingredient under the statute defining the offense. One essential ingredient in such defrauding is the purpose or intent to defraud.

In *United States* v. *Noveck, supra,* the defendant was indicted for perjury (Sec. 125 of the U. S. Criminal Code) for having falsely understated his taxable income. The

[10]See Appendix A. pp. 15-16.

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offense was committed more than three years before the indictment. The government contended that since the perjury was committed in the making of an income tax return and was specially alleged to have been committed for the purpose of defrauding the United States, the offense was brought within the six year period of limitations of the 1921 proviso, *supra*. This Court affirmed the quashing of the indictment by the District Court on the ground that the prosecution was barred by the three year statute of limitations. The Court stated:

> "But the alleged purpose to defraud the United States is not an element of the crime defined in Sec. 125, on which the indictment is based. That allegation does not affect the charge; it need not be proved and may be rejected as mere surplusage. Re Lane, 135 U. S. 443, 448, 34 L. ed. 219, 221, 10 Sup. Ct. Rep. 760. The construction of Secs. 125 and 1044 contended for by the government divides perjury into two classes. It makes one include offenses having the elements specified in Sec. 125 and the other to include those containing the further element of purpose to defraud the United States. And that would apply similarly to every offense to which the three-year period fixed by Sec. 1044 was applicable before the proviso was added. The effect is to create offenses separate and distinct from those defined by specific enactments. Obviously that was not intended. The Act of November 17, 1921, merely added a proviso to a statute of limitations. Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain. The language in question does not require the construction contended for. Indeed it is not at all appropriate for the making of such classifications or the creation of offenses. Its purpose is to apply the

> six-year period to every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense. There are several such offenses. Section 37 affords an illustration. But perjury as defined by Sec. 125 does not contain any such element." (ibid pp. 203-204)

In *United States* v. *Scharton, supra,* defendant was indicted under Sec. 1114 (b) of the Revenue Act of (February 26) 1926 (44 Stat. 116, 27, U. S. C. Supp. V, Title 26, § 1266) and charged with wilfully attempting to evade and defeat taxes for 1926 and 1927 by falsely understating taxable income. The District Court sustained the defendant's plea in bar, that the offenses were committed more than three years prior to the return of the indictment and held inapplicable the six year period of limitation fixed by the 1926 proviso to U. S. C. Supp. V, Title 18, Sec. 585.

In the Supreme Court, the government contended that fraud is implicit in the concept of evading and defeating; that attempts to obstruct or defeat the lawful functions of any department of the government, on the one hand, or to cheat it out of money to which it is entitled, on the other hand, are attempts to defraud in the United States if accompanied by deceit or other dishonest methods. The government's position, broadly, was that any effort to defeat or evade a tax possesses every element of an attempt to defraud.

The Supreme Court rejected this position and affirmed the judgment of the District Court, stating:

> "We are required to ascertain the intent of Congress from the language used and to determine what cases the proviso intended to except from the general statute of limitations applicable to all offenses against the internal revenue laws. Section 1114 (a) makes

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wilful failure to pay taxes, to make return, to keep necessary records, or to supply requisite information, a misdemeanor; and Sec. 1114 (c) provides that wilfully aiding, assisting, procuring, counselling, or advising preparation or presentation of a false or fraudulent return, affidavit, claim, or document shall be felony. Save for that under consideration these are the only sections in the Revenue Act of 1926 defining offenses against the income tax law. There are, however, numerous statutes expressly making intent to defraud an element of a specified offense against the revenue laws. Under these, an indictment failing to aver that intent would be defective; but under Sec. 1114 (b) such an averment would be surplusage, for it would be sufficient to plead and prove a wilful attempt to evade or defeat. Compare United States v. Noveck, 271 U. S. 201, 203, 70 L. ed. 904, 905, 46 S. Ct. 476.

"As said in the Noveck Case, statutes will not be read as creating crimes or classes of crimes unless clearly so intended, and obviously we are here concerned with one meant only to fix periods of limitation. Moreover, the concluding clause of the section, though denominated a proviso, is an excepting clause and therefore to be narrowly construed. United States v. McElwain, 272 U. S. 633, 639, 71 L. ed. 451, 453, 47 S. Ct. 219. And as the section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses." (ibid pp. 521-2)

From these decisions, it is clear that where a crime, such as perjury, or the wilful attempt to evade and defeat a tax by false statements, is a distinct offense, complete in itself, and does not involve, as an essential ingredient of the crime,

the purpose or intent to defraud the United States, the suspension statute, based on the 1921 and 1926 provisos and now embodied in the first clause of § 590 (a) does not apply. The Supreme Court has rejected the contention that fraud or the intent to defraud is implicit in such separate crimes. It has refused to allow the 1921 and 1926 provisos to be used to create new classes of crimes involving defrauding, unless clearly so intended and it has refused to find such an intent in these provisos. It has disregarded the form of the provisos and held them to be excepting clauses, to be liberally interpreted in favor of repose and not to be extended by construction to embrace frauds not so denominated by the statutes creating the offenses.

On the other hand, the 1921 proviso has been held applicable to cases where, under the statute defining the offense, the intent to defraud was an essential ingredient of the crime charged. Thus, in *Bailey* v. *U. S.*, 13 F. (2d) 325, in a prosecution under § 29 of the Criminal Code (Comp. St. § 10193, U. S. C. Title 18 Sec. 73) for uttering and publishing a forged indorsement of a check payable by the United States in payment of a claim against the United States, with intent to defraud the United States, the six year period of limitations of the 1921 proviso was held applicable because

> "The defrauding of the United States is a statutory ingredient of the crime charged in the second count of the indictment, at least, and there was therefore no error in the rulings complained of . . ."

In *Weinhandler* v. *United States*, 20 F. 2d 359, cert. den. 275 U. S. 554, in a prosecution under Section 47 of the Criminal Code (Comp. Stat. 10214, U. S. C. Title 18,

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Section 100) for embezzlement of Federal Funds, the six year period of limitations of the 1921 proviso was held applicable, because

> "It is impossible to embezzle the money of another without committing a fraud on him. Uttering and publishing a forged indorsement of a draft of the United States Treasury with intent to defraud the United States is within the proviso. *Bailey* v. *U. S.* (*supra*). In view of these authorities, we hold that fraud is an element of the crime of embezzlement."

In that case, the crime involved a direct and pecuniary loss to the government, and the "defrauding" of the United States that was involved was a necessary ingredient of the offense charged.

In *Falter* v. *United States,* 23 F. 2d 420, cert. denied 277 U. S. 590, defendants, government employees and others were indicted under Section 37 of the Criminal Code[11] for conspiracy to defraud the United States by false statements to a government agency that contracts for goods had not been filled and that, therefore, the buyer was entitled, in substitution, to new disposable goods, as they came in, at prices fixed by the original contract, which were lower than the prices current when the substitute goods were delivered, thus depriving the Government of the difference between the contract and the current price. Intent to defraud is necessarily an element of conspiracy to defraud. The court held the 1921 proviso applicable.

"The fraud was neither an incident nor the purpose of the crime as in *U. S.* v. *Noveck* . . . nor an offense against

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[11]Appendix A., p. 14.

the revenue laws, as in *U. S.* v. *McElwain*. . . . The conspiracy to defraud was the crime and the crime consisted only in the fraudulent conspiracy" (*ibid.*, 426).

To like effect, see:

Evans v. *United States*, 11 F. 2d 37 (Violation of 18 U. S. C., Section 80, prior to 1934 amendment, in a false claim for refund of portion of excise taxes. "The evil which the statute was intended to reach was the obtaining of money from the United States by false pretenses." 1921 proviso *held* applicable).

Miller v. *United States*, 24 F. 2d 353, 361, cert. denied 276 U. S. 638 (Conspiracy to defraud the United States by allowing illegal or suspicious claims, without proper investigation, for a pecuniary reward. "The overt acts charged in furtherance of the conspiracy, and essential to the statutory crime of conspiracy, showed a consummated fraud as against the government and the property rights of the United States. . . . The conspiracy was one not merely to secure the allowance of claims, but to defraud the United States by procuring the payment of the money and to transfer the bonds to the Swiss Corporation 'whereby the United States was to be and was defrauded of its possession and dominion of a large fund under its administration' ". 1921 proviso held applicable).

In re *Doyle*, 42 F. 2d 686 (rev'd per curiam without opinion *United States* v. *Doyle*, 42 F. 2d 1086 (Refusal to answer questions before a grand jury, inter alia, on the grounds of self-incrimination, which could not be claimed if 1926 proviso were inapplicable, where answer might have made witness liable for possible prosecution for conspiracy to defraud the United States in connection with a false

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claim for refund of taxes. 1926 proviso *held* applicable).

All of these cases, it will be noted, involved as elements of the crime not merely the intent to defraud but also the element of pecuniary or property loss to the United States.

(2) Pecuniary or Property Loss to the United States

It is well established in the cases that "defrauding" has at least two accepted meanings, and the question to which we now direct ourselves is which of these two accepted meanings is to be accorded to "defrauding" as used in clause 1 of Section 590 (a).

The usual and primary meaning of defrauding is cheating the government out of property or money (*United States* v. *Cohn,* 270 U. S. 339, 346-47; *Hammerschmidt* v. *United States,* 265 U. S. 185, 188). In statutes where it is apparent from the context or otherwise that more was intended, defrauding has been held to have a secondary and broader meaning of interfering with or obstructing lawful governmental functions by dishonest means (*Hammerschmidt* v. *United States, supra; U. S.* v. *Keitel,* 211 U. S. 370, 393; *Haas* v. *Henkel,* 216 U. S. 462, 479-480; *United States* v. *Curley,* 122 F. 738, *cert. denied* 195 U. S. 678; *Curley* v. *United States,* 130 F. 1, *cert. denied* 195 U. S. 678).

In cases construing the word "defraud" in the general conspiracy statute (*supra,* § 37 of the Penal Code) the courts have uniformly held that "defraud" in that statute is to be given its secondary and broader meaning "which

must result from the words 'in any manner or for any purpose' by which the word 'defraud' is accompanied in the statute" (*United States* v. *Keitel, supra,* at 393; *Hammerschmidt* v. *United States, supra; Haas* v. *Henkel, supra; United States* v. *Curley, supra, Curley* v. *United States, supra.* See Appendix A, p. 13).

On the other hand, in statutes where neither the language nor the context warrants an extension of the term "defrauding" to a secondary and broader meaning, the courts have held that defrauding is to be construed in its primary sense of cheating the government out of property or money. Thus, in *United States* v. *Cohn, supra,* the Court in distinguishing "defrauding" as used in Section 35 of the Criminal Code (U. S. C. A. Title 18, § 80 prior to the 1934 amendment, Appendix A, p. 11) from its use in the general conspiracy statute, held:

> "It is contended by the United States that, by analogy to the decisions in *Haas* v. *Henkel,* 216 U. S. 462, 479, 54 L. ed. 569, 577, 30 Sup. Ct. Rep. 249, 17 Ann Cas. 112 and *Hammerschmidt* v. *U. S.,* 265 U. S. 182, 188, 68 L. ed. 968, 970, 44 Sup. Ct. Rep. 511 and other cases involving the construction of Sec. 37 of the Penal Code relating to conspiracies to defraud the United States, the word "defrauding" in the present statute should be construed as being used not merely in its primary sense of cheating the government out of property or money, but also in the secondary sense of interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means. The language of the two statutes is, however, so essentially different as to destroy the weight of the supposed analogy. Section 37, by its specific terms, extends broadly to every conspiracy "to defraud the

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> United States in any manner and for any purpose," with no words of limitation whatsoever, and no limitation that can be implied from the context. Section 35, on the other hand has no words extending the meaning of the word 'defrauding' beyond its usual and primary sense. On the contrary it is used in connection with the words 'cheating or swindling', indicating that it is to be construed in the manner in which those words are 'ordinarily used as relating to the fraudulent causing of pecuniary or property loss.' And this meaning is emphasized by other provisions of the section in which the word 'defraud' is used in reference to the obtaining of money or other property from the government by false claims, vouchers, and the like; and by the context of the entire section, which deals with the wrongful obtaining of money and other property of the government, with no reference to the impairment or obstruction of its governmental functions." [270 U. S., 346-7.]

Applying these criteria to the term "defrauding" in clause 1 of § 590(a), it is apparent that the "defrauding" in this statute is limited to its primary sense of cheating the government out of property or money. There are no words extending the meaning of the word beyond this primary sense. It is true that the words "whether by conspiracy or not, and in any manner" are used in connection with "defrauding", but these relate to devices and methods of defrauding and not to its scope. The case would be different, if, as in the general conspiracy statute, the words "or for any purpose" were also employed. To defraud the United States in any manner or for any purpose would encompass the broadest scope of fraud, as the courts have indicated in the case under the conspiracy statute. Had Con-

gress in enacting clause 1 of Sec. 590(a) intended to extend the meaning of defrauding beyond its usual and primary sense, it could easily have done so by broadening the language to read "defrauding, whether by conspiracy or not, in any manner, or for any purpose," and this would have included interference with deceptive practices with lawful functions of the government. The failure to do so indicates a contrary intent.

Moreover, other sections and the entire context of the Contract Settlement Act and Surplus Property Acts of 1944, of which clause 1 of § 590(a) is a part, emphasize that "defrauding" in that clause is limited to its primary meaning. Thus, the Declaration of Policy of the Contract Settlement Act of 1944, *supra,* states five objectives, all of which concern property or pecuniary matters with which the United States is directly concerned, and, as its sixth and last objective, declares the purpose of the Act to be "to use all practicable methods *compatible with the foregoing objectives* to prevent improper payments and *to detect and prosecute fraud.*" (*Supra, U. S. C. A. Title* 41, § 101(a)-(f) (italics supplied)). Other sections of the Act relating to fraud uniformly use the word "fraud" in its primary sense, in reference to obtaining money or property from the government in connection with war contracts [Ibid. §§ 107, 115(a), (b), 116(a), (b), 118(d), (e), 119(b), (c), (d), Appendix A, pp. 6-10].

Section 119(b) (Clause 1 of Section 590(a)) is one of three interrelated sections which together make up an integrated scheme to detect and prosecute such frauds. Section 119(c) provides for civil remedies for those who make false fraudulent or fictitious claims or the like or who en-

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gage in deceitful practices for the purpose of securing benefit, payment or other pecuniary values from the United States in connection with war contracts. Section 119(d) makes U. S. C. Title 18, § 80 applicable, with its criminal sanctions, to any statement, representation, bill, receipt and the like make, caused to be made or used *for any purpose under this Chapter* (italics supplied)—i.e. for any purpose having to do with war contracts and involving property or pecuniary loss to the United States. Finally, Sec. 119(b) suspends the running of the statute of limitations in offenses involving defrauding or attempting to defraud the United States, i.e. in its primary sense of causing the United States pecuniary or property loss. (Appendix A, pp. 9-10).

The Surplus Property Act of 1944, *supra,* states in its Declaration of Policy objectives which relate to pecuniary and property matters in which the United States is directly concerned. (U. S. C. A. Title 50. App. § 1611.) Other sections of that Act relating to fraud uniformly use the word "fraud" in its primary sense as relating to obtaining money or property from the government in connection with surplus property. (Ibid. § 1635 (a)-(d). Appendix A, pp. 10-11.) The enactment of clause 1 of § 590(a) in the context of the Contract Settlement and Surplus Property Acts of 1944, in a setting of payments, settlements, financing, disposal and other pecuniary values, confirm the conclusion that the "defrauding" involved is used in its primary sense.

If there remains any ambiguity as to the meaning of defrauding in clause 1 of § 590(a), that ambiguity may be and is resolved by reference to its legislative history. *Harrison* v. *Northern Trust Co.,* 317 U. S. 476, 479; *U. S.* v. *American Trucking Association,* 310 U. S. 534, 542-44.

In reporting out H.R. 6484, which became the Act of August 24, 1942 and was incorporated, as we have seen, without essential change in the Contract Settlement and Surplus Property Act of 1944 and thus became the first clause of the present § 590(a), both the House and Senate Committees on the Judiciary left no doubt that the bill was aimed at suspending the running of the statute of limitations as to offenses against the laws of the United States involving defrauding or attempting to defraud the United States in connection with war contracts let by government agencies, independent establishments and government owned or government controlled corporations for materials and equipment and necessarily involving pecuniary or property loss, actual or attempted, to the United States.[11a]

The Senate and House Reports demonstrate that the necessity for such suspension arose out of the gigantic war program, involving the expenditure by the government of huge sums of money in war contracts for materials and equipment, the difficulty of discovering frauds in connection with these expenditures, and the necessary preoccupation of the law enforcement branch of the government with the enforcement of other laws, which prevented the investigation, discovery and prosecution of this type of fraud within the normal period of limitations. The legislative history of the Act of August 24, 1942 is searched in vain to find any intent to suspend the statute of limitations as to offenses under the second clause of Section 80, as amended, such as those charged in the first nine counts of

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[11a]H. Rept. No. 2051; S. Rept. No. 1544 to accompany H. R. 6484. Appellant's Appendix A 96. See also Debate on H. R. 6484 in Senate, 77th Congress, 2nd Session, 88 Cong. Rec. 6160, July 15, 1942.

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the indictment in the case at bar which are entirely unrelated to war contracts and do not involve pecuniary or property loss to the government.

When the Act of August 24, 1942 was amended by the Contract Settlement Act of 1944 and the Surplus Property Act of 1944, thus becoming clause 1 of Section 590(a), the Suspension Act, the essential wording of the 1942 Act was retained. The effect of the 1944 amendments can be succinctly stated in the language of the trial court:

> "Section 19 (b) of the Contract Settlement Act . . . merely amended the 1942 Act by enlarging it specifically to include any offense under the Contract Settlement Act and by extending the time for the suspension of the statutes of limitation. Section 28 of the Surplus Property Act of 1944 . . . again amended the 1942 Act by making it applicable to a further class of offenses, those under the Surplus Property Act." (R.28)

Nothing in the legislative history or statutory context of those Acts, dealing as they do with war contracts and property, indicated any intention to alter the plain meaning of the Suspension Act as one relating to war contracts for material and equipment, which necessarily involves pecuniary or property loss to the United States.

In *United States* v. *Raphael*, Kennedy, *J.*, U. S. District Court, Eastern District of New York, March 17, 1947, Memorandum Opinion, unreported but quoted in full in Appellee's Brief in the court below, Appellee's Appendix pp. 88-92, where the issue of the applicability of the Suspension Act was squarely presented, the statute (U. S. C. Title 12, § 1731-a of the Banking law) under which the indictment was laid denounced as a crime the conduct of

any person who "for the purpose of obtaining any loan or advance or credit . . . with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Authority for insurance . . . causes to be made any statement, knowing the same to be false." Defendant moved to dismiss the indictment on the ground that prosecution was barred by the statue of limitations. The government invoked the Suspension Act on the ground that false statements for the purpose of inducing the government to insure loans constitutes a defrauding and an interference with governmental functions because the government would have to pay the losses consequent upon the fraudulent conduct of the defendant.

The court denied the motion to dismiss and held the Suspension Act applicable. The Court stated that the clause must be given "the same strict construction that its analogue received in the *Noveck, McElwain,* and *Scharton* cases." It held that fraud was an essential ingredient of U. S. C. Title 18, Sec. 1731-a, not merely an incident or purpose of it.

In that case, the language of the statute defining the offenses spells out the requisite intent and unequivocally refers to a defrauding of the United States in the primary meaning of that term.

It is significant to point out that in all cases under the analogous 1921 and 1926 provisos, the element of pecuniary or property loss to the United States was a necessary prerequisite for the application of the six year period of limitations.[12] Where such loss was not involved as an essen-

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[12]See *Bailey* v. *United States, supra; Evans* v. *United States, supra; Weinhandler* v. *United States, supra; Falter* v. *United States supra; Miller* v. *United States, supra;* In re *Doyle, supra.*

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tial ingredient of the crime, the three year statute of limitations was held to bar prosecution.[13] No case has been found[14] in which the statute of limitations was extended under the 1921 or 1926 provisos or suspended under the Suspension Act, (except *United States* v. *Gottfried,* 165 F. 2d 462, cert. denied 304 U. S. 586 which we believe is wrong for the reasons discussed in subsection D. below) unless "defrauding" in the statute defining the offenses was limited to its primary sense and necessarily involved pecuniary or property loss to the United States.

In the light of the language of Suspension Act, its context with other sections in the setting of the Contract Settlement and Surplus Property Acts of 1944, its legislative history of the clause, the decision in the *Raphael* case, and the requirements of pecuniary or property loss to the United States in decisions under the analogous 1921 and 1926 provisos, we submit that the Suspension Act employs "defrauding" in its primary sense of cheating the government out of property or money and the Suspension Act is therefore applicable only where defrauding in this primary sense is an essential ingredient under the statute defining the offense.

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[13]*U. S.* v. *Noveck, supra,* perjury, 1921 proviso *held* inapplicable; *contra, U. S.* v. *Dunten,* 4 F. (2d) 616, perjury in making final proof under a homestead entry of public land. *U. S.* v. *Scharton, supra,* wilful attempt to evade and defeat by false statements, 1926 proviso *held* inapplicable. In this last case, the Court pointed out that there are numerous statutes making intent to defraud an element of a specified offense against the revenue laws, and referred to U. S. C. Title 26, Secs. 261, 306, 316, 555, 667, 775, 843, 1180, 1181, 1184, 1118 (U.S.C.A. Title 26, Secs. 2806, 2833, 2841, 2308, 2309, 2656, 2657, 2161, 2180, 1823, 3321, 3320, 3324). These sections, besides embodying the requisite intent to defraud, also employ defrauding in its primary meaning.

[14]*U. S.* v. *Dunten, supra,* is apparently overruled by *U. S.* v. *Noveck, supra.*

B. Neither the Intent to Defraud Nor Pecuniary or Property Loss to the United States is An Essential Ingredient of the Offenses Charged in the Indictment under the False Claims Act.

(1) THE INTENT TO DEFRAUD THE UNITED STATES

Prior to 1934, the False Claims Act read:

> "Whoever . . . for the purpose and with the intent of cheating and swindling or defrauding the government of the United States shall knowingly and wilfully . . . make or cause to be made any false or fraudulent statements or representations." (Appendix A. p. 1)

In *United States* v. *Cohn, supra,* an indictment under this statute charged that the defendant, for the purpose and with the intent of defrauding the government, had wrongfully obtained non-dutiable merchandise from the Collector of Customs by knowingly causing false and fraudulent statements to be made. This Court sustained demurrer to the indictment on the ground that the acts charged were not a defrauding of the United States within the meaning of the Statute. The Court held that "defrauding" was to be construed in its primary sense, in the manner in which the word is ordinarily used, as relating to the fraudulent causing of pecuniary or property loss and that the United States was not defrauded by the acts alleged in the indictment.

Largely as a result of this decision, the statute was amended by the Act of June 18, 1934 to its present form (See Appendix A, p. 1). The legislative history of the 1934 amendment shows that while proposed legislation first sought to include "with intent to defraud" and, later, to retain "defrauding" as an essential element in the offense,

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the amendment as finally enacted and now in effect, rejected this attempt and framed the statute on a different basis. This legislative history is summarized in *United States* v. *Gilliland*, 312 U. S. 86, 93-4, where the application of the second clause of the amended statute was sustained as to counts of an indictment charging false and fraudulent statements on a matter within the jurisdiction of a department and agency of the United States, where no "intent to defraud" was alleged and pecuniary or property loss to the United States was not involved.

> "The amendment eliminated the words 'cheating and swindling' and broadened the provision so as to leave no adequate basis for the limited construction which had previously obtained. The statute was made to embrace false and fraudulent statements or representations when these were knowingly and wilfully used in documents or affidavits 'in any matter within the jurisdiction of any department or agency of the United States.' In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. . . .
>
> "Legislation had been sought by the Secretary of the Interior to aid the enforcement of laws relating to the functions of the Department of the Interior and, in particular, to the enforcement of regulations under Sec. 9 (c) of the National Industrial Recovery Act of [June 16] 1933 with respect to the transportation of 'hot oil.' The Secretary's effort was due, as he stated, to the lack of a law under which prosecutions might be had 'for the presentation of false papers.' The bill which was

passed by Congress, however, was amended in its final stages so as to require 'intent to defraud the United States.'[15] This bill was returned by the President without his approval for the reason that the offense as defined was covered by existing law which provided for more severe punishment than that proposed by the bill. 78 Congressional Record, pt, 6 p 6778 (73rd Cong. 2nd ses.) Another measure was then proposed by the Secretary of the Interior which would obviate these objections and accomplish the purpose of reaching the presentation of false papers in relation to 'hot oil'. A bill was then passed and approved which included, with other amendments of Sec. 35, the provision now before us, omitting the limiting words which had been deemed to make the former provision applicable only to cases where pecuniary or property loss to the government had been cause.[16] The report of the Judiciary Committee of the Senate stated that the

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[15]For the text of this bill (H. R. 8046) and the Secretary's letter, see Appendix A, pp. 15, 19. This bill eliminated the words "cheating and swindling or defrauding" and substituted the words "with intent to defraud."

In reporting out this bill the Committee of Judiciary of the House stated "the rights of the accused are protected by the provision that the act must be committed *wilfully and knowingly and with intent to defraud the United States.*" (H. Rept. No. 829 to accompany H. R. 8046)

[16]The bill (H. R. 8912) which was resubmitted after the President's veto, contained the original language of clause 2 of Section 80, "with the intent of cheating and swindling or defrauding the government of the United States" (H. Rept. No. 1463, May 3, 1934, to accompany H. R. 8912) and passed the House in this form (78 Cong. Rec. pt. 6, pp. 8136-37). This bill, however, was amended in the Senate (S. Rept. 1202, May 28, 1934, 78 Cong. Rec. pt. 6, pp. 9790, 11270, 73 Cong. 2nd sess.) and, as finally enacted, omitted not only "cheating and swindling" but also "or defrauding the government of the United States". (ibid p. 11270)

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> amendment in question had been proposed by the Department of the Interior with the purpose 'of reaching a large number of cases involving the shipment of "hot" oil, where false papers are presented in connection therewith.' "

In the light of the construction of the earlier statute in the *Cohn* case (*supra*), the purpose of this amendment to reach false papers, the rejection by the President of the bill as sent to him for signature, and the elimination of the words "with intent to defraud" and "defrauding" from the bill as finally enacted, we submit that, as the Court stated of the perjury statute in the *Noveck* case *supra* the purpose to defraud the United States is not an element of the crime defined by the False Claims Act; it does not affect the charge; it need not be proved and may be rejected as mere surplusage. Indeed, the *Gilliland* case itself (*supra*) is conclusive as to the fact that an offense alleged under the False Claims Act is a distinct offense, complete in itself, and does not involve the intent to defraud the United States as an essential ingredient of the offense. Similar examples are found in the lower court cases, under the False Claims Act [See e.g. *United States* v. *Mellon*, 96 F. (2d) 462, cert. denied 304 U. S. 586; *United States* v. *Presser*, 99 F. (2d) 819; *United States* v. *Goldsmith*, 108 F. (2d) 1917, cert. denied 309 U. S. 678; *Ex parte Berkhoff*, 65 Fed. Supp 976, 979 159 F. (2d) 6; *United States* v. *Zavala*, 139 F. (2d) 830, 831].

The validity of this conclusion is confirmed by several decisions holding that the intent to defraud the United States is not an essential element, under false and fraudulent statement statutes, which in all essential respects are identical with the False Claims Act.

Thus in *United States* v. *Van Leuven*, 62 F. 69, 70, the statute involved penalized those who

> "knowingly or wilfully make or aid or assist in the making or in any way procures the making or presentation of any false or fraudulent affidavit, declaration, certificate, voucher, or paper or writing purporting to be such, concerning any claim for pension or payment thereof or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions or of the Secretary of the Interior" [R. S. §4746, July 7, 1898 c. 578, 30 Stat. 718 (now superseded, see 18 U. S. C. A. §81 R. S. §§4746, 4766; August 17, 1912 c. 301, §1, 37 Stat. 312; July 3, 1930, c. 863, §2 46 Stat. 1016)].

It will be noted that except for its limitation to the Secretary of the Interior and the Commissioner of Pensions (with respect to pensions and bounty lands, see *United States* v. *Keitel, supra,* and possibly to writings) the language of this Act (now superseded) is substantially the same as that of the False Claims Act, upon which the indictment herein is grounded, i.e., both penalize the making of false or fraudulent statements and neither includes the words "defrauding" or "with intent to defraud" the United States. In overruling a demurrer to an indictment under this statute, it was held that

> " if the indictment was based upon the provisions of Sections 5418, 5421, or 5479 of the Revised Statutes (U. S. C. Title 18, §§ 72, 73), the failure to aver the intent or purpose of defrauding the United States would probably be fatal to the indictment as these sections are alike in the provision that the acts named therein must be done with the purpose of defrauding the United States; and under the ruling of the Su-

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preme Court of the United States in U. S. v. Staats, 8 How. 40-45, the purpose to defraud the United States is one of the essentials in the definition of the crime. I do not understand, however, that the indictment in question is based upon either one of these sections, but upon the provisions of Section 4746 which declares that 'every person who knowingly or wilfully in any wise procures the making or presentation of any false or fraudulent affidavit concerning any claim for pension or payment thereof or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions . . . shall be punished, etc.' The gist of this offense is not in an effort to defraud the United States but it consists in knowingly procuring the making of a false or fraudulent affidavit concerning a claim for pension or payment thereof, or any other matter within the jurisdiction of the Commissioner of Pensions. The statute does not in terms make an intent or purpose to defraud the United States an element in the offense and the facts necessary to fully make out the crime can averred without charging the intent to defraud the United States" [See also *United States* v. *Hansee*, 79 F. 303].

In the light of the criteria established by the Supreme Court in the *Gilliland, Noveck* and *Scharton* cases *supra,* we submit that defrauding is not an essential element of the offense as defined by the False Claims Act. To import that concept into False Claims Act from the Suspension Act would be to create a new and separate offense, where such a purpose is negatived by the legislative history and the plain words of the statute. The crimes alleged in the first nine counts of the indictment are not denominated frauds by the False Claims Act, any more than the false swearing

in the *Noveck* case was denominated a fraud by the perjury statute; and fraud is no more implicit in these counts than fraud was implicit in the false statements in the *Scharton* case.

(2) Pecuniary or Property Loss to the United States.

As already indicated the False Claims Act, prior to the 1934 amendment, required the intent to defraud the United States, and pecuniary or property loss to the United States, actual or attempted, as necessary ingredients of the offense. In the 1934 amendment these requirements were deleted, and in the *Gilliland* case, *supra*, an indictment was sustained charging false or fraudulent statements, without averring the purpose to defraud the United States. In discussing the effect of the 1934 amendment, on this point, the Court said "In this there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the Congressional intent to protect the authorized functions of governmental departments and agencies which might result from the deceptive practices described" (*ibid* 93). The point was put succinctly in *United States* v. *Mellon, supra,* sustaining a judgment under the second clause of §80 as amended, against the objection that the indictment was insufficient on the theory that there can be no violation of §80 without pecuniary loss to the government. As a result of the amendment, the court held, "the element of pecuniary loss to the government is no longer an essential ingredient of the crime" (96 F. (2d), 463. *United States* v. *Presser, supra. United States* v. *Rohleder* 157 F. (2d) 126).

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In the case at bar, none of the eleven counts alleges any pecuniary loss to the government as a result of the false or fraudulent statements charged. Petitioner was appointed to a temporary position as a government employee in March 1942, subject to character and fitness investigation. He served in this capacity until inducted in the armed forces, and after his honorable discharge, until November 15, 1946 (R. 171-6, 181, 218, Tr. 103-109, 286, 1117). There is no allegation that he received money without such service or that he cheated the government out of property or money. In passing on the motion to dismiss the indictment, the trial court agreed, holding that False Claims Act is not limited to frauds involving pecuniary or property loss to the government and that the offense charged "amounts to a deceptive practice, which as Justice Hughes stated in *U. S.* v. *Gilliland, supra,* was exactly what was encompassed" (R. 29).

At the trial, the government's theory of the case was that pecuniary or property loss to the United States was immaterial. It introduced no evidence that the Government had suffered any such loss and resisted, as irrelevant and collateral, efforts of petitioner to introduce evidence that he had received no compensation from the government between November 15, 1946, when petitioner asserts that he resigned from government service, and December 20, 1946, when the Government claims he was removed (Defendant's Exhibit 1; App. 57, 63-64, 72).

Finally, the trial court charged the jury that "pecuniary or monetary loss to the government is not an element of the offense, so that the government is not required to prove that the government suffered a pecuniary loss in connection with the offense here charged" (R. 41).

The proposition is, therefore, supported by authority and conceded by the government that, in this case, under the False Claims Act, pecuniary or property loss is not an essential element of the offense charged in the first nine counts of the indictment.

We submit that the Suspension Act is inapplicable to suspend the running of the statute of limitations on the first nine counts of the indictment, because the Suspension Act applies only where "defrauding" is an essential ingredient of the offense charged, and such defrauding necessarily involves the intent to defraud and pecuniary or property loss to the United States. Under the False Claims Act, however, "defrauding" is not an essential element of the crimes charged in the first nine counts of the indictment, because they do not require the intent to defraud or pecuniary or property loss to the United States as essential elements of the crime. Since the offenses charged in the first nine counts of the indictment occurred more than three years prior to the indictment, prosecution is barred by the three year statute of limitations of U. S. C. Title 18, Sec. 582.

C. The Opinion of the Court Below

The court below held that the Suspension Act did not apply to the offenses involved in the first nine counts of this indictment under the False Claims Act. In reaching this result, it held that under the *Noveck* and kindred cases, construing the 1921 and 1926 provisos, "The Supreme Court has clearly said that (1) a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way was not an essential ingredient", and, under the *Gilliland* case, (2) "that such defrauding of the United States is not an

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essential ingredient of offenses under the False Claims statute" (R. 275). It pointed out that the government had admitted (1) that the 1921 and 1926 provisos are "in all essential respects identical with" the present Suspension Act, (2) that the *Noveck* and kindred cases were decided in accordance with the principle that "in order to be affected by the suspension statute 'defrauding or an attempt to defraud the United States' must be *an ingredient* under the statute defining the offense" (R. 275), and (3) that the False Claims Act "does not require the government to establish proof of (a) intent to defraud or (b) pecuniary or property loss to the United States" (R. 275-276). It rejected the government's contention, under these admissions, that the 1934 amendment to the False Claims Act had merely varied its form and not its substance, that the Act retained after its amendment "all its essential fraud characteristics" and that a false statement made in a matter within the jurisdiction of an agency of the United States "'*necessarily* (italics in Government brief) involves a fraud.'" (R. 275-276).

> "The difficulty with the foregoing contention is that it ignores the plain rulings in Noveck and kindred cases. Those cases involved false statements, under oath. The offenses tended to obstruct, by dishonest means, the operation of a department of the Government. The Court held that the Suspension Act (actually an identical predecessor) does not apply to such offenses. So that even if the False Claims Act does involve the sort of fraud the Government says it does, the Suspension Act does not apply; the rulings in the Noveck and similar cases related precisely to that same sort of fraud. . . . It follows that we are of the opinion that the first nine counts of this indictment were barred by the statute of lim-

itations and that the defendant's motion that they be dismissed should have been granted" (R. 276).

It should be noted that the court below appears to have placed its decision on the ground that "defrauding" as used in the Suspension Act requires that pecuniary loss must be an essential element in the underlying statute defining the offense, and that the False Claims Act is a statute in which such loss is not an essential element. This is a narrower ground than warranted by the legislative history and applicable decisions of this Court relating to the Suspension Act and the False Claims Act. As we have pointed out above, the Suspension Act is not applicable to suspend the running of the statute of limitations unless the offense to which its application is sought also involves the intent to defraud as an essential ingredient, and the False Claims Act is a statute in which neither intent to defraud nor pecuniary loss to the government is an essential ingredient. Despite this limitation, we submit that the result reached by the court below is clearly correct.

D. The Government's Contentions

The Government's primary contention is that the wilful making of false statements to the United States, as charged in the first nine counts of the indictment under the False Claims Act, involve a "defrauding" of the United States, within the meaning of "defrauding", as used in the Suspension Act (Gov't. Brief, pp. 19, 27-28).

1. It seeks to support this contention by asserting that the plain words of the Suspension Act and of the False Claims Act are "almost identical" (*ibid.* 27); that the Suspension Act is not limited to defrauding which results in

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pecuniary loss because it refers, "in the broadest language imaginable" to defrauding the United States "in any manner"; that the False Claims Act equally applies to false statements, without limitations of pecuniary loss, under the decision of this Court in the *Gilliland* case; and that both statutes reach offenses involving any manner of fraud on the government (*ibid.* 28-29).

These assertions ignore the plain fact that "defrauding", which appears in the Suspension Act, was deliberately and intentionally eliminated by amendment from the False Claims Act to avoid the limitation of pecuniary loss which this Court in *United States* v. *Cohn, supra,* held the word "defrauding", in its ordinary meaning, required. The word "defrauding" which is a requirement of the Suspension Act now nowhere appears in the False Claims Act. The plain words of the two statutes are, therefore, not "almost identical"; they are critically different. Nor is the use of the words "in any manner", as applied to "defrauding" in the Suspension Act, the broadest language imaginable. As we have pointed out, when Congress wished to reach offenses involving the broadest scope of fraud on the government, as in the general conspiracy statute, it used apt language "in any manner *and for any purpose*" which eliminated the requirement of pecuniary loss and broadened the construction of defrauding to include interference with lawful governmental functions by dishonest means (*United States* v. *Keitel,* 211 U. S. 370, 393). The failure to employ "for any purpose" in the Suspension Act indicates that Congress did not intend to use "the broadest imaginable language" but meant to limit "defrauding" to its primary and ordinary sense of causing pecuniary loss to the government. This conclusion is amply supported by the adoption in the present

Suspension Act of the identical language of the 1921 and 1926 provisos, after they had been construed by this Court in the *Noveck* and *Scharton* cases and in numerous lower court cases without exception, to limit the application of those provisos to statutes in which purpose or intent to defraud in its primary sense was an essential element. It is also fully supported by the legislative history of the present Suspension Act in its purpose to reach fraud in connection with war contracts and in its setting as a part of the Contract Settlement and Surplus Property Acts, with their limitation to pecuniary and property values.

2. The Government next says that the wilful making of false statements to the United States under the False Claims Act is a fraud on the United States within the concept of fraud recognized in *Haas* v. *Henkel,* 216 U. S. 462, 479-480; *Hammerschmidt* v. *United States,* 265 U. S. 182, 188; *United States* v. *Gilliland, supra;* and *United States* v. *Bayer,* 331 U. S. 532, 533 (Gov't. Brief 19-20, 28, 30, 41-42). It cites *United States* v. *Gottfried,* 165 F. 2d 360, 367-368, cert. denied 333 U. S. 860, and *United States* v. *Agnew,* 6 F. R. D. 566 (E. D. Pa.) as cases upholding the application of the present Suspension Act to false statements or false claims under the False Claims Act.

But the *Haas, Hammerschmidt* and *Bayer* cases involve offenses under the general conspiracy statute only, where the crime is conspiracy to defraud the United States in any manner *and for any purpose.* For reasons already indicated, the construction of the word "defraud" in those cases can have no proper application to the word "defrauding" in the Suspension Act which does not include the broadening words "or for any purpose" or to false state-

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ments under the False Claims Act from which the narrowing words "defrauding" and "intent to defraud" have been eliminated.

With all deference, we submit that the decision in *United States* v. *Gottfried* rests upon the same misapplication of the doctrine of the conspiracy cases. In that case, defendants were indicted in two counts under the False Claims Act for having fraudulently overstated and certified to the O.P.A. their sugar consumption for 1941. A second indictment, consolidated with the above for trial, charged one of the defendants in the first case and two additional defendants, with having conspired, together with a fourth individual, to defraud the United States of the faithful services of one of the defendants, an O.P.A. investigator, in violation of 18 U. S. C. Section 88. The indictment under the False Claims Act was filed more than three years after the crime had been committed. The court rejected the argument that defrauding the United States, as used in the Suspension Act, should be confined to frauds of those who contracted with the United States or supplied it with materials and that it does not include interference even though fraudulent which results in no pecuniary loss. It held:

> "Textually, this reasoning has nothing to commend it, except so far as the word 'fraud' may imply pecuniary loss; and whatever may be said as a new matter for so circumscribing that word, *it has been the law, at least since 1910, that in the statute* [20] *under which this indictment was drawn, 'fraud' includes any conduct 'calculated to obstruct or impair its (the United States)' 'efficiency and*

[20]Section 80, 18 U. S. C. A.

> *destroy the value of its operations and reports.*"[21] We see no reason for reading the words 'defrauding the United States' in the statute of limitations now in question less comprehensively; certainly there was not enough ground for that in the debates of Congress. Besides, the purpose of the amendment was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive which perfectly fits the situation at bar."

[21] *Haas* v. *Henkel*, 216 U. S. 462, 479, 30 S. Ct. 249, 254, 54 L. Ed. 569, 17 Ann. Cas. 1112.

It is apparent that the court applied the doctrine of the conspiracy cases as exemplified in *Haas* v. *Henkel*, to the interpretation of the ord "defrauding" as used in the Suspension Act. The court is demonstrably in error in citing *Haas* v. *Henkel* as authority for the statement that it has been the law since 1910 that fraud in the False Claims Act has a meaning not restricted to pecuniary loss. The pertinent sections of the False Claims Act here involved were not enacted until 1918 (Act of October 23, 1918 c. 194, 40 Stat. 1015); and until 1934, these sections were limited in application to false statements involving pecuniary or property loss to the United States. See *United States* v. *Cohn, supra, United States* v. *Gilliland, supra. Haas* v. *Henkel* involved the general conspiracy statute (18 U. S. C. Section 88) and did not purport to construe the sections of the False Claims Act under which the indictment was drawn. The error is of no consequence, with respect to the present construction of the False Claims Act, since the 1934 amendment eliminated the requirement of pecuniary loss and broadened the statute so that it now punishes deceptive practices in respect to authorized functions of

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government departments, without such a limitation. The error is of great consequence, however, in connection with the construction of "defrauding" as employed in the Suspension Act. The court does not refer to construction by this Court of "defrauding" in the 1921 and 1926 provisos in the *Noveck* and kindred cases, which limited the applicability of those identical predecessors of the Suspension Act to offenses in which the intent to defraud in a pecuniary sense was an essential element. It does not refer to the reenactment in the present Suspension Act of the pertinent identical language of the 1921 and 1926 provisos, after such restrictive interpretation by this Court. It does not refer to the House and Senate Committee Reports on the Act of August 24, 1942 which specifically referred to the 1921 proviso and indicated that the present Suspension Act was designed to fulfill the same purpose, in connection with the huge governmental expenditures of money in the last war. Instead, it relies in part on the fact that there was not enough ground in the Congressional debates to limit the Suspension Act in the manner contended for, particularly in the light of the general purpose of the suspension. It bases its holding primarily on the construction of "defrauding" in the general conspiracy statute, which includes the words "or for any purpose" and carries over that construction to the Suspension Act, in which those words of broadening scope are lacking. We submit that in the light of all the factors mentioned above, which the court has ignored, such a construction of the Suspension Act is wholly unwarranted. Nor does the denial of a writ of certiorari by this Court import any expression of opinion on the merits of that construction. *United States* v. *Carver*, 260 U. S. 42; *Sunal* v. *Large*, 332 U. S. 174, 181.

The *Agnew* case, *supra*, cited by the government, furnishes little support for its contention. There, the defendant was charged under Section 80 with having knowingly prepared false payroll statements over a period of approximately three years by padding the payroll to include specified names and accounts paid, when in fact no such employees existed and no such amounts were paid, the statements having been used for invoices on which payment was made by the War Shipping Administration and for tax returns forms to the Treasury Department and the Social Security Board. Defendant moved to dismiss on the ground of the statute of limitations. The Court stated, citing the *Weinhandler* case, *supra*, that clause 1 of Section 590(a) was applicable, since "fraud is made an essential element of the statute" (Section 80). The Court, however, held that the statute of limitations was suspended by clause 2 of Section 590(a), since it was undenied that the offense charged "was committed in connection with the performance (and) payment for . . . of (a) subcontract . . . which is connected with or related to the prosecution of the . . . war". The Court also cited Section 119(d) of the Contract Settlement Act of 1944 (Appendix A, p. 10) which specifically applies Section 80 to offenses under the Contract Settlement Act.

Thus, the holding of the case is that clause 2 of Section 590(a) is applicable to the prosecution, and the statement as to the applicability of clause 1 of Section 590(a) is not necessary to support the decision. In the case at bar, clause 2 of Section 590(a) is not claimed to be applicable and the case in no way relates to war contracts, or to the subject matter of the offenses to which Section 80 is made applicable by Section 19(d) of the Contract Settlement Act of 1944. Moreover, it appears from the decision that the offense

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charged may have involved other clauses of Section 80 than those involved in the case at bar, and, most important, related to false or fraudulent statements inolving pecuniary loss to the United States in connection with war contracts. The *Agnew* case, therefore, sounds in embezzlement, like the *Weinhandler* case, *supra;* the case at bar is a simple false or fraudulent statement case, like the perjury statute in the *Noveck* case. The *Agnew* decision, we submit, is not in point.

The Government's citation of the *Gilliland* case, in this respect, is completely inapposite. (Gov't. Brief, pp. 19, 29). Contrary to the Government's contention, this Court did not at any place in its opinion in the *Gilliland* case term the wilful making of false statements to the United States a "fraud" or a "defrauding" of the United States, nor can any inference to that effect be drawn from any part of the opinion, in view of the effect which it gave to the 1934 amendment, as completely eliminating "defrauding" and the "intent to defraud" from the statute.

3. The Government further seeks support in the legislative history of the Suspension Act for its contention that "defrauding" as used therein is applicable to the False Claims Act, which it terms a "fraud" statute. (Gov't. Brief, pp. 30, 37). It asserts that the addition of clauses "(2)" and "(3)" to the Suspension Act specifically relating to offenses in connection with the procurement and disposition of war materials demonstrates that clause "(1)" was intended by Congress to include fraud offenses which were not war frauds, i. e. frauds in the procurement and disposition of war material. (*Ibid.*, pp. 35-36). Such a contention, of course, lends no support to a broader interpretation

of "defrauding" in the Suspension Act than is warranted by all the factors which we have noted, nor is there anything in the legislative history of clauses "(2)" and "(3)" which alters the basis for the restrictive interpretation of clause "(1)". In the court below, the government cited with approval *United States* v. *Raphael, supra,* where clause "(1)" was held applicable to a prosecution under 12 U. S. C. Section 1731(a) of the banking law for false statements made in January 1940 to the Federal Housing Administration.[17] These statements obviously did not relate to war frauds, yet the court there held that clause "(1)" must be given "the same strict construction that its analogue received in the *Noveck, McElwain* and *Scharton* cases."

The government also urges that the specific reference to the False Claims Act in Section 119(d) of the Contract Settlement Act demonstrates that Congress intended this important substantive provision to have the benefit of the suspension of the statute of limitations provided in Section 119(b). (Gov't. Brief, p. 36). But Section 119(d) merely says that the False Claims Act shall apply to false statements, claims or the like made or used for any purpose under the Contract Settlement Act or under any regulations pursuant to that Act. There is nothing in Section 119(b) or (d) of the Contract Settlement Act which broadens the meaning of "defrauding", as used in the Suspension Act (Section 590(a), clause 1), or narrows the meaning of the sections of the False Claims Act, here involved, as given in the *Gilliland* case, to bring the two statutes into equivalence. The government argues that there would be no purpose in providing for the suspension of the limitations period if the suspension provisions were not intended to apply to the

[17]Brief for Appellee, pp. 10, 11, 23, 31.

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most important criminal sanction in the act. The short answer to this contention is that clause "(2)" of the Suspension Act provides for such suspension as to any offense committed in connection with the negotiation, procurement, award, performance, payment for, financing, cancellation, or other termination of settlement of any contract related to the prosecution of the present war or disposition of termination inventory by any war contractor or Government agency. The benefit of suspension is thus applied comprehensively to offenses relating to all phases of the Contract Settlement Act, including false statements under the False Claims Act (Section 119(d)). And other sections of the False Claims Act defining offenses of false claims for payment of money, which are not involved in the case at bar, are benefited by the Suspension Act, applied in the manner we suggest. See *United States* v. *Agnew, supra; Evans* v. *United States, supra.* Nothing in the Government's argument requires the application of the Suspension Act to offenses under the pertinent sections of the False Claims Act, which do not involve the intent to defraud and pecuniary or property loss to the United States.

4. The Government challenges the decision of the court below on the ground that it based its decision on the *Noveck, McElwain* and *Scharton* cases, which it regarded as dispositive of the issue, notwithstanding that none of these cases involved a prosecution for making false and fraudulent statements to a Government agency in violation of the False Claims Act (Gov't. Brief, pp. 19, 38). The Government claims that the court below has misread these cases and that neither they, nor any other case interpreting them, has held that the extended period of limitations applied only to offenses in which the Government suffered financial or prop-

erty loss (*ibid* 38). We do not pause to reargue the opinion of the court below on this score, which we regard as correct, but unnecessarily limited in its interpretation of these cases. The Government concedes that the 1921 and 1926 provisos, as interpreted in the *Noveck, McElwain* and *Scharton* cases, were not held applicable in any case to offenses which did not specifically include fraud as one of its elements (*ibid* 40-41). But those cases defined the offense of fraud as requiring the intent to defraud and none of the offenses involved in those cases required either such an intent or pecuniary loss to the Government, and there are no cases to the contrary, except *United States* v. *Dunten*, 4 F. 2d 616 (D. C. D. Oregon 1925) which is overruled by the *Noveck* case (1926). On the other hand, all the cases which have held that the statute of limitations was extended, under the 1921 and 1926 provisos, or suspended under the Suspension Act, except the *Gottfried* case, have involved as essential elements under the statute defining the offenses, both the intent to defraud and pecuniary loss to the United States (*Bailey* v. *United States, supra; Evans* v. *United States, supra; Weinhandler* v. *United States, supra; Falter* v. *United States, supra; Miller* v. *United States, supra; In re Doyle, supra; United States* v. *Raphael, supra, United States* v. *Agnew, supra*). Nothing which the government urges from the decided cases invalidates the holding of the court below or lends any support to the contention that "defrauding" as used in the Suspension Act involves any different requirements for its application than those which this Court defined in the *Noveck, McElwain* and *Scharton* cases.

5. Finally, the Government argues that as a matter of policy, Congress in enacting the Suspension Act must have been aware that the kind of fraud which interferes with the

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lawful functioning of a department of the Government very often carries consequences infinitely more serious than those involved in mere financial loss and that only by attributing to Congress a lack of good judgment is it possible to narrow the Suspension Act in the manner contended for by petitioner (Gov't. Brief, pp. 29-30). In the court below, the Government asked "Is it reasonable to suppose that Congress would have said to the Department of Justice that 'by virtue of the war you may take your time in the investigation, detection and prosecution of frauds of a contractual nature involving pecuniary loss to the Government, but as to all other types of fraud, you will investigate, detect and prosecute as though the country were at peace?' " (Brief for Appellee, pp. 22-23). The judgment of Congress on this score was otherwise expressed and, we submit, for good reason.

Senate Report No. 1544 and House Report No. 2051 (App. A pp. 16-17), which are in pertinent part identical, make it abundantly clear that the reasons for the enactment of the Suspension Act were the difficulty and length of time involved in discovering, investigating and gathering evidence to prosecute frauds in connection with the huge sums of money expended by the Government in war contracts for material and equipment and the necessary preoccupation of the Department of Justice with the prompt enforcement of other laws, particularly those relating to the security of the nation in time of war, which prevented the discovery, investigation and prosecution of this type of war contracts fraud within the three year period of limitation. The present case, if conviction is warranted, represents the type of case, in the latter group, in which, in the contemplation of Congress, the Government should for its own protection have acted with dispatch and within the three year period

of limitation. On the other hand, the prosecution of war contract frauds involves no such pressing problem. As pointed out in the House and Senate Reports, the task of prosecuting war contractors for frauds committed in connection with war contracts is difficult and time consuming. If such prosecutions were required during the war, they might well have interfered with the more immediate problems of the enforcement of laws relating to national security, with which the Department of Justice was busily concerned. Moreover, the prosecution of war contractors for defrauding the government at the time when they are engaged in producing material and equipment for the war effort might have the effect of slowing down war production. Such, at any rate, was the theory behind the policy adopted by the government during the war with respect to the stay of prosecutions under the anti-trust acts. Thus, the distinction which the government in its brief in this case considers unreasonable is one which, as a matter of policy, the government itself adopted during the war. The government's appeal to reason on this score would have been more persuasive if it had asked: "Is it reasonable to suppose that Congress meant the Department of Justice to take its time, as though the country were at peace, in prosecuting war service appointees, employed in war-time agencies, who have lied about their character and fitness for government employment during time of war?" So phrased, the question can be answered in only one way. We submit that the policy and legislative history of the Suspension Act fully justify that answer.

6. In the court below, the Government conceded, and has not denied in this Court, that the False Claims Act does not require allegation or proof of intent to defraud

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or of pecuniary or property loss to the United States. (Gov't. Brief, p. 26, R. 276, Brief for Appellee, pp. 5, 10, ftn. 3, 29). It further concedes, though grudgingly, as it conceded in the court below, the validity of the holding in the *Noveck* and kindred cases, that the identical predecessors of the Suspension Act were not applicable to suspend the running of the statute of limitations, unless the element of defrauding, embodying intent to defraud, was included in the statute defining the offense. (Gov't. Brief, pp. 39, 41, R. 275). These concessions, we submit, are fatal to the Government's case. For, if the intent to defraud and pecuniary loss need not be alleged or proved in an offense under the False Claims Act, they are not elements of the offense. *Hagner* v. *United States,* 285 U. S. 427, 431; *Re Lane,* 135 U. S. 443. Since the Suspension Act applies only where such matters are elements of the offense, it has not suspended the running of the statute of limitations on the first nine counts of the indictment herein.

CONCLUSION

For the foregoing reasons, we respectfully submit that the court below correctly held that the first nine counts of the indictment are barred by the three year statute of limitations (18 U. S. C. Sec. 582).

OSMOND K. FRAENKEL,
ALLAN R. ROSENBERG,
Attorneys for Petitioner

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APPPENDIX A

1. Statutes Involved

Act of June 18, 1934, c. 587 (48 Stat. 996) as amended by the Act of April 4, 1938 c. 69 (52 Stat. 197) U. S. C. Title 18, § 80. (Criminal Code, section 35 (A).) *Presenting false claims.*

Whoever shall make or cause to be made or present or cause to be presented for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015; June 18, 1934, c. 587, 48 Stat. 996; April 4, 1938, c. 69, 52 Stat. 197)

Act of October 23, 1918 c. 194 (40 Stat. 1015) U. S. C. Title 18, Sec. 80. (Criminal Code, section 35, amended.) *Presenting false claims; aiding in obtaining payment thereof.*

Whoever, shall make or cause to be made or present or cause to be presented, for payment or approval, to or

by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (R. S. Sec. 5438; May 30, 1908, c. 235, 35 Stat. 555; Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015)

Act of August 24, 1942 c. 555 § 1 (56 Stat. 747) as amended U. S. C. Title 18, § 590 (a). *Suspension of limitations on offenses involving the defrauding of the United States.*

The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation or other termination of settlement, of any contract, subcontract, or purchase order

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which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under sections 1611-1646 of Appendix to Title 50, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law. Aug. 24, 1942, c. 555, § 1, 56 Stat. 747, as amended July 1, 1944, c. 358, § 19 (b), 58 Stat. 667; Oct. 3, 1944, c. 479, § 28, 58 Stat. 781.

Act of April 13, 1876 c. 56 (19 Stat. 32) as amended by Act of December 27, 1927, c. 6 (45 Stat. 51) U. S. C. Title 18, § 582. *Offenses not capital.*

No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed. (As amended Dec. 27, 1927, c. 6, 45 Stat. 51)

Act of April 13, 1876 c. 56 (19 Stat. 32) as amended by Act of November 17, 1921, c. 124, (42 Stat. 220) U. S. C. Title 18, Sec. 582. *Offenses not capital.*

No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided,* however, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by con-

spiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This section shall apply to acts, offenses, or transactions where the existing statute of limitations had not yet fully run on November 17, 1921; but the proviso shall not apply to acts, offenses or transactions which on that date were already barred by the provisions of existing laws. (R. S. Sec. 1044; April 13, 1876, c. 56, 19 Stat. 32; Nov. 17, 1921, c. 124; Sec. 1, 42 Stat. 220)

Revenue Act of [February 26,] 1926 c. 27, Sec. 1110 (a) (44 Stat. 114) U. S. C. Supp. V Title 26, Sec. 585.

"That no person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: *Provided*, That for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, the period of limitation shall be six years, but this proviso shall not apply to acts, offenses, or transactions which were barred by law at the time of the enactment of the Revenue Act of 1924; *Provided further*, That the time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings: *Provided further*, That the provisions of this Act shall not apply to offenses committed prior to its passage: *Provided further*, That where a complaint shall be instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district: And provided further, That this Act shall not apply to offenses committed by officers of the United States." (As amended February 26, 1926, c. 27 Sec. 1110 (a), 44 Stat. 114.)

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Act of August 24, 1942, c. 555 § 1 (56 Stat. 747).

> "The running of any existing statute of limitations applicable to any offense against the laws of the United States, involving defrauding or attempts to defraud the United States whether by conspiracy or not, and in any manner and now indictable under any existing statutes shall be suspended until June 30, 1945 or such earlier time as the Congress by concurrent resolution or the President may designate." (August 24, 1942, c. 555, Secs. 1, 56, Stat. 747)

Contract Settlement Act of 1944. July 1, 1944 c. 358 § 1 et seq. (58 Stat. 649) U. S. C. A. Title 41 § 101 et seq.

OBJECTIVES OF THE ACT

SECTION 101. The Congress hereby declares that the objectives of this Act are—

(a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;

(b) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement;

(c) to assure uniformity among Government agencies in basic policies and administration with respect to such termination settlements and interim financing;

(d) to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes by providing prime contractors and subcontractors with notice of termination of their war contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security;

(e) to assure the expeditious removal from the plants of prime contractors and subcontractors of termination inventory not to be retained or sold by the contractor;

(f) to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud.

SETTLEMENT OF SUBCONTRACTORS CLAIMS—CONCLUSIVENESS OF SETTLEMENTS

SEC. 107 (a) Where, in connection with the settlement of any termination claim by a contracting agency, any war contractor makes settlements of the termination claims of his subcontractors, the contracting agency shall limit or omit its review of such settlements with subcontractors to the maximum extent compatible with the public interest. Any contracting agency (1) may approve, ratify, or authorize such settlements with subcontractors upon such evidence, terms, and conditions as it deems proper; (2) shall vary the scope and intensity of its review of such settlements according to the reliability of the war contractor, the size, number, and complexity of such claims, and other relevant factors; and (3) shall authorize war contractors to make such settlements with subcontractors without review by the contracting agency, whenever the reliability of the war contractor, the amount or nature of the claims, or other reasons appears to the contracting agency to justify such action. Any such settlement of a subcontract approved, ratified, or authorized by a contracting agency shall be final and conclusive as to the amount due to the same extent as a stttlement under subsection (c) of section 6 of this Act, and no war contractor shall be liable to the United States on account of any amounts paid thereon except for his own fraud.

PERSONAL FINANCIAL LIABILITY

SEC. 115 (a) Whenever any payment is made from Government funds to any war contractor or other person

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as an advance, partial or final payment on any termination claim, or pursuant to any loan, guaranty, or agreement for the purchase of any loan, or any commitment in connection therewith, entered into by the Government, no officer or other Government agent authorizing or approving such payment or settlement, or certifying the voucher for such payment, or making the payment in accordance with a duly certified voucher, shall be personally liable for such payment, in the absence of fraud on his part. In settling the accounts of any disbursing officer the General Accounting Office shall allow any such disbursements made by him notwithstanding any other provisions of law.

§ 115 (b) For the purpose of making termination settlements or interim financing any Government agency is authorized to rely upon such certificates of war contractors as it deems proper and to permit war contractors and other persons to rely upon such certificates without financial liability in the absence of fraud on their part.

The General Accounting Office

§ 116 (a) Any other provision of law notwithstanding, the function of the General Accounting Office with respect to any termination settlement made, authorized ratified, or approved by a contracting agency shall be confined to determining, after final settlement, (1) whether the settlement payments to the war contractor were made in accordance with the settlement, and (2) whether the records transmitted to it, or other information, warrant a reasonable belief that the settlement was induced by fraud. For this purpose the General Accounting Office shall have the authority to examine any records maintained by any contracting agency or by any war contractor relating to any termination settlement.

§ 116 (b) Whenever the Comptroller General is convinced that any settlement was induced by fraud, he shall so certify, together with all the facts relating thereto, to

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the Department of Justice, to the Director, and to the contracting agency concerned. Upon receipt of such certificate (1) the Department of Justice shall make an investigation to determine whether such settlement was induced by fraud, and (2) until the Department of Justice notifies the contracting agency that in its opinion the facts do not support the belief that the settlement was induced by fraud, the contracting agency, by set-off or otherwise, may withhold, from amounts owing to the war contractor by the United States under such settlement or otherwise, the amount of the settlement, or the portion thereof, which, in the opinion of the Comptroller General as stated in his certificate, was affected by the fraud. In any such case the Department of Justice shall take such action as it deems appropriate to recover payments made to such war contractor. The General Accounting Office shall not suspend credit to any disbursing officer on any disbursements made by him under such settlement in the absence of fraud on his part.

RECORDS, FORMS, REPORTS

§ 118 (d) The Director shall make such investigations as he deems necessary or desirable in connection with termination settlements and interim financing. For this purpose he may utilize the facilities of any existing agencies and if he determines that the facilities of existing agencies are inadequate, he may establish a unit in the Office of Contract Settlement to supplement and facilitate the work of existing agencies. He shall report to the Department of Justice any information received by him indicating any fraudulent practices, for appropriate action.

§ 118 (e) Whenever any contracting agency or the Director believes that any settlement was induced by fraud, the agency or Director shall report the facts to the Department of Justice. Thereupon, (1) the Department of Justice shall make an investigation to determine whether such

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settlement was induced by fraud, and (2) until the Department of Justice notifies the contracting agency that in its opinion the facts do not support the belief that the settlement was induced by fraud, the contracting agency, by set-off or otherwise, may withhold, from amounts owing to the war contractor by the United States under such settlement or otherwise, the amount of the settlement, or the portion thereof, which, in its opinion, was affected by the fraud. In any such case the Department of Justice shall take such action as it deems appropriate to recover payments made to such war contractor.

PRESERVATION OF RECORD; PROSECUTION OF FRAUD

§ 119 (b) The first section of the Act of August 24, 1942 (56 Stat. 747; title 18, U. S. C., Supp. II, sec. 590a), is amended to read as follows:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

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§ 119 (c) (1) Every person who makes or causes to be made, or presents or causes to be presented to any officer, agent, or employee of any Government agency any claim, bill, receipt, voucher, statement, account, certificate, affidavit, or deposition, knowing the same to be false, fraudulent, or fictitious or knowing the same to contain or to be based on any false, fraudulent, or fictitious statement or entry, or who shall cover up or conceal any material fact, or who shall use or engage in any other fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any benefit, payment, compensation, allowance, loan, advance, or emolument from the United States or any Government agency in connection with the termination, cancelation, settlement, payment, negotiation, renegotiation, performance, procuremen, or award of a contract with the United States or with any other person, and every person who enters into an agreement, combination, or conspiracy so to do, (1) shall pay to the United States an amount equal to 25 per centum of any amount thereby sought to be wrongfully secured or obtained but not actually received, and (2) shall forfeit and refund any such benefit, payment, compensation, allowance, loan, advance, and emolument received as a result thereof and (3) shall in addition pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit.

§ 119 (d) The provisions of section 35-A of the Criminal Code (18 U. S. C., sec. 80) shall apply to any statement, representation, bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition made or used or caused to be made or used for any purpose under this Act or under any regulations pursuant to this Act.

Surplus Property Act of 1944. October 3, 1944 c. 479 § 479 c. 28 (58 Stat. 781) U. S. C. A. Title 50 App. § 1611 et seq.

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Objectives

§ 1611 The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—

(a) to assure the most effective use of such property for war purposes and the common defense;

(b) to give maximum aid in the reestablishment of a peacetime economy of free independent private enterprise, the developmnt of the maximum of independent oprators in trade, industry, and agriculture, and to stimulate full employment;

(c) to facilitate the transition of enterprises from wartime to peacetime production and of individuals from wartime to peacetime employment;

(d) to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise;

(e) to foster and to render more secure family-type farming as the traditional and desirable pattern of American agriculture;

(f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises;

(g) to encourage and foster post-war employment opportunities;

(h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;

(i) to establish and develop foreign markets and promote mutually advantageous economic relations between the United States and other countries by the orderly disposition of surplus property in other countries;

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(j) to avoid dislocations of the domestic economy and of international economic relations;

(k) to foster the wide distribution of surplus commodities to consumers at fair prices;

(l) to effect broad and equitable distribution of surplus property;

(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home and abroad with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping;

(n) to utilize normal channels of trade and commerce to the extent consistent with efficient and economic distribution and the promotion of the general objectives of this Act (without discriminating against the establishment of new enterprises);

(o) to promote production, employment of labor, and utilization of the productive capacity and the natural and agricultural resources of the country;

(p) to foster the development of new independent enterprise;

(q) to prevent insofar as possible unusual and excessive profits being made out of surplus property;

(r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, and to facilitate prompt redistribution of such property to consumers;

(s) to dispose of surplus Government-owned transportation facilities and equipment in such manner as to promote an adequate and economical national transportation system; and

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(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.

Civil Remedies and Penalties

§ 1635 (a) Where any property is disposed of in accordance with this Act and any regulations prescribed under this Act, no officer or employee of the Government shall (1) be liable with respect to such disposition except for his own fraud or (2) be accountable for the collection of any purchase price which is determined to be uncollectible by the agency responsible therefor.

(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

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U. S. C. Title 18, § 88. (Criminal Code, section 37)

Conspiring to commit offense against the United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Sec. 37, 35 Stat. 1096.)

Act of March 4, 1909, c. 321 § 28 (35 Stat. 1094), U. S. C. Title 18, § 72 [Criminal Code, section 28]

Making, forging, counterfeiting, or altering bonds, bids, or public records; transmitting such papers. Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, the office of any officer of the United States, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States, shall be fined not more than $1,000, or imprisoned not more than ten years, or both. (R. S. §§ 5418, 5479; Mar. 4, 1909, c. 321, Sec. 28, 35 Stat. 1094).

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2. Legislative Materials

House Calendar No. 134

73D CONGRESS
2D SESSION

H. R. 8046

[Report No. 829]

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 16, 1934

Mr. SUMNERS of Texas introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed

FEBRUARY 22, 1934

Referred to the House Calendar and ordered to be printed

A BILL

To provide a penalty for the knowing or willful presentation of any false written instrument relating to any matter within the jurisdiction of any Department or agency of the Government with intent to defraud the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person who with intent to defraud the United States knowingly or willfully makes or aids or assists in the making, or who with such intent in anywise procures the making or presentation of any false or fraudulent affidavit, declaration, statement, certificate, voucher, or paper or writing purporting to be such, concerning or

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pertaining to any application, bond, bid, loan or payment thereof, or concerning or pertaining to any matter within the jurisdiction of any department, establishment, administration, agency, office, board, or commission of the United States or any corporation owned or controlled by the United States in whole or in part, shall be punished by a fine not exceeding $5,000 or by imprisonment for a term of not more than five years, or by both such fine and imprisonment.

Senate Report No. 1544, July 13, 1942, 77th Congress, 2nd session, (to accompany H. R. 6484.)

The Committee on the Judiciary to whom was referred the bill (H. R. 6484) to suspend during the present war the running of the Statute of Limitations applicable to certain offenses having considered same report on the bill favorably to the Senate with an amendment, with recommendations that it, as amended, do pass. The amendment follows:

Page 1, line 7, strike out after word suspended and in line 8 strike out the following "of the present war and for six months thereafter" and insert in lieu thereof "until June 30, 1945 or until such earlier time as the Congress by concurrent resolution or the President may designate."

The purpose of the proposed legislation is to suspend any existing statute of limitations applicable to offenses involving the defrauding or attempting to defraud the United States or any agency thereof for the period of the present war. Contracting for the United States is done through various agencies, including the departments and independent establishments and government owned and government controlled corporations and frauds against all of these agencies are intended to be embraced by the bill.

During the World War many frauds committed against the government were not discovered until the three year

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Statute of Limitations had almost expired and, as stated in the Committee report hereafter referred to many of the alleged offenses were barred from prosecution. The general criminal statute (Rev. Stat. § 1044) was amended on November 17, 1921, extending the period to six years in respect to offenses involving frauds against the U. S. (42 Stat. 220 U. S. C. title 18, Sec. 582). This provision was repealed by the Act of December 27, 1927 (45 Stat. 51).

In connection with the World War legislation of this character, the committee Report (H. Rep. 365, 67th Cong.) stated the following:

> "The Department of Justice has been engaged in the investigation and is now engaged in the investigation of various alleged offenses, consisting largely of frauds against the government which are claimed to have occurred during the war with Germany and since its conclusion. Many of these alleged offenses grew out of the contractual relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds. Many of these transactions require the most minute investigation to ascertain the exact facts, and in every case a considerable period must elapse before such facts may be gathered from the files and other sources that the Department may know whether prosecutions are justified or not. In many cases, months and perhaps considerably longer periods will be required for such investigations. Under the existing statute of limitations quoted above many of these alleged crimes are already barred and in all such cases under the law, no prosecutions can be had if any might be thought advisable. * * * "

During normal times the present three year statute of limitations may afford the Department of Justice sufficient time to investigate, discover and gather evidence to prosecute fraud against the government. The United States,

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however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and prosecute frauds against the government, it is recognized that in the varied dealings, opportunities will no doubt be presented for unscrupulous persons to defraud the government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law enforcement branch of the Government is also busily engaged in its other duties, including the enforcement of the espionage, sabotage and other laws.

Your committee is of the opinion that action should be taken at this time to extend the limitations statute so that frauds may be discovered and punished even after the termination of the present conflict and to insure that the limitations statute will not under stress of present day events operate for the protection of those who would defraud or attempt to defraud the United States.

The proposed measure has been cleared with the legislative committee of the Department of Justice and with the Bureau of the Budget.

The Secretary of the Interior
Washington, February 7, 1934

Hon. Henry F. Ashhurst
Chairman, Committee on the Judiciary,
United States Senate.

My Dear Senator Ashurst: There is transmitted herewith a draft of a proposed bill providing a penalty for the presentation of a false written instrument relating to any matter within the jurisdiction of the Secretary of the Interior, Administrator of the Federal Emergency Administration

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of Public Works, or Administration of the Code of Fair Competition for the Petroleum Industry.

A large number of cases are arising constantly in the enforcement of the laws relating to the Interior Department; the transaction of business in connection with the Public Works Administration; in violations of the code of fair competition for the petroleum industry; and enforcement of regulations under section 9 (c) of the National Industrial Recovery Act of June 16, 1933, which are not susceptible of successful prosecution on charges of perjury, and there is no law at present under which prosecution may be secured for the presentation of false papers.

The early enactment of this legislation is especially desired, so that prompt and vigorous steps may be taken while expenditures are being made of Public Works Administration funds, in view of the following provisions of section 2 (c) of the National Industrial Recovery Act:

"This title shall cease to be in effect and any agencies established hereunder shall cease to exist at the expiration of 2 years after the date of enactment of this act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended." It is respectfully requested that the proposed measure be placed before the Senate for appropriate action.

Sincerely yours,

Harold L. Ickes
Secretary of the Interior

[78 Congressional Record, pt. 6, p. 2859]

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